

Mr. BROWNBACK. On behalf of the Republicans, I yield the remainder of our time.

The ACTING PRESIDENT pro tempore. The question is on the adoption of the resolution.

The concurrent resolution (S. Cons. Res. 26) was agreed to.

The preamble was agreed to.

#### MORNING BUSINESS

Mr. HARKIN. Madam President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Texas is recognized.

#### NOMINATION OF JUDGE SOTOMAYOR

Mr. CORNYN. Madam President, I would like to turn to another important topic; that is, the pending confirmation of Judge Sotomayor to be Associate Justice of the U.S. Supreme Court. Like many Senators, I have had the opportunity to visit with Judge Sotomayor in my office and, of course, congratulated her on this great honor. I further pledged to her that she would receive a fair and dignified confirmation proceeding. Unfortunately, that has not always been the case in the Senate, but I did tell her that as far as I was concerned, I would do everything I could to make sure she was treated with respect.

Over the last few weeks, my colleagues on the Judiciary Committee and I have begun a thorough review of her record. Judge Sotomayor comes with one of the longest tenures of any judge nominated to the U.S. Supreme Court on the Federal bench—for about 17 years, so there is a rather lengthy record to review. In addition, she has given, as you might expect, many speeches and written law review articles and made other statements that deserve our attention. She has responded to the questionnaire sent by the Senate Judiciary Committee, and there are other followup questions which I anticipate she will be answering in the coming weeks.

So our review is ongoing in anticipation of a confirmation hearing beginning July 13 in the Senate Judiciary Committee.

But so far it is fair to say that there are a number of issues that have come up which I would like to talk about briefly that I anticipate she will have an opportunity to clarify or otherwise respond to and make her position clear for the American people and for the Senate as we perform our constitutional obligation under article II, section 2 of the Constitution.

Most of the focus, during a judicial confirmation hearing, is on the President's authority under the Constitu-

tion to nominate individuals to serve as judges. But, in fact, the very same provision of the Constitution, the very same section of the Constitution, section 2 of article II, also imposes an obligation on the Senate. In other words, we have a constitutional duty ourselves in the Senate to provide advice and consent and then to vote on the nomination once voted out of the committee.

The concerns I wish to raise at this point do not suggest that these are disqualifying, by any means, for Judge Sotomayor. I believe that, as I have indicated, she deserves the opportunity to explain her approach to these issues and particularly her judicial philosophy more clearly and to put the opinions and statements we have come across during our review in proper context.

I believe it is not appropriate for any of us to prejudge or to preconfirm Judge Sotomayor. Our job as Senators is to ask how she would approach the duties of an Associate Justice of the United States Supreme Court. And the areas, as I said, I would like to focus on are numbered three.

The first issue has to do with her approach to the second amendment. Of course, the second amendment to the U.S. Constitution, part of our Bill of Rights, incorporates the right to keep and bear arms.

The second amendment says:

A well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed.

The American people understand that the second amendment limits government and protects individual liberty. As Justice Joseph Story wrote nearly 200 years ago, the second amendment acts as a "strong moral check against the usurpation and arbitrary power of rulers."

As the U.S. Supreme Court itself held last year in the *District of Columbia v. Heller*: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."

I agree strongly with the Supreme Court's reasoning in the *Heller* decision, and I think most Americans accept that as the law of the land. Judge Sotomayor, on the other hand, as a member of the Second Circuit Court of Appeals, was one of the judges that first was given an opportunity to apply that Supreme Court precedent in *Heller* to the States.

She concluded in that decision that the right to keep and bear arms was not a fundamental right, and, therefore, was not enforceable against the States via the due process clause of the Fourteenth Amendment. Her decision in that case was troubling in light of the *Heller* decision, especially because her opinion included very little significant legal analysis.

I would expect and hope Judge Sotomayor would elaborate on her

thinking about this case, as well as the scope of the second amendment, during the course of the confirmation hearings. Americans need to know whether we can count on Judge Sotomayor to uphold all of the Bill of Rights, including the second amendment.

The next subject that I think will bear some discussion during the confirmation hearings is Judge Sotomayor's views of private property rights, another fundamental right protected by our Bill of Rights, that is simply stated in the fifth amendment of the U.S. Constitution, the right not to have property taken for public use without just compensation.

The fifth amendment provides an absolute guarantee of liberty against the power of eminent domain, by permitting government to seize private property only for public use.

Our colleagues will recall the controversial decision of the U.S. Supreme Court in 2005 in *Kelo v. City of New London*, a decision where the Supreme Court greatly broadened the definition of public use and, thereby doing, greatly limited the property rights protected by the Bill of Rights for more than two centuries.

The Court held that government can take property from one person and give it to another person if the government decided that by so doing it would promote economic development. The *Kelo* decision represents a vast expansion of government power of eminent domain. And that is why I introduced legislation that same year to limit that power and to restore the basic protections of our homes, small businesses, and other private property rights that the Founders intended in the fifth amendment to the Constitution.

I believe the *Kelo* decision went too far. Yet by her decision in the case of *Didden v. Village of Port Chester*, it appears Judge Sotomayor did not feel like it went far enough. Judge Sotomayor was part of a panel that upheld an even more egregious overreach by government when it came to private property rights.

In that case, two private property owners wanted to build a pharmacy on their land but in an area the government had essentially handed over to another private developer. The developer offered the owners a choice: Give me a piece of the action or we will proceed to condemn your property. The property owners, as you would think would be their right, refused. Yet the government, the local government, delivered on the developer's threat the very next day.

I believe this decision represents an outrageous abuse of the power of eminent domain for a nonpublic purpose and a tremendous extension of an already flawed decision in the *Kelo* case by the U.S. Supreme Court. So I think it is only fair and right that we ask Judge Sotomayor how she can square that decision in the *Didden* case with the plain meaning of the fifth amendment to the Constitution and, indeed, even the *Kelo* case itself.

The third area we need to understand Judge Sotomayor's approach to deciding cases involving employment discrimination. We need to understand how Judge Sotomayor interprets and applies the Equal Protection Clause of the fourteenth amendment, which reads in part:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

For most Americans, the "equal protection of the laws" means just what it says. It means that government cannot treat you differently based on your race or your sex or your ethnicity. It simply means that government cannot legally practice discrimination, including reverse discrimination.

But in a case recently argued to the U.S. Supreme Court called *Ricci v. DiStefano*, Judge Sotomayor participated in a Court of Appeal's decision which raises legitimate questions about her commitment to the provisions of equal protection of the laws in the Constitution. At least I think it raises questions that we need to ask her to respond to and to hopefully clarify her views on whether government can lawfully discriminate based on skin color.

The facts of that case—the case involves firefighters in New Haven, CT. The fire department established a testing program to ensure a fair process in deciding who would be promoted to captain and lieutenant. The testing was rigorous, and it was not racially biased. It was racially neutral to give everyone a fair chance to succeed in taking the test.

But the government, as it turned out, did not get the results it wanted. The mayor and five commissioners of New Haven felt that not enough African Americans had passed the test, so they threw out the test and refused to promote anyone.

This was unfair to the firefighters who had qualified for promotion. Many of the firefighters were of Italian or Hispanic descent and felt they themselves had fallen victim to racial discrimination by the city government.

In fact, one of the fire commissioners was quoted as saying the department should stop hiring people with too many vowels in their name.

So the firefighters sued in Federal court. The case came before a three-judge panel, including Judge Sotomayor. Judge Sotomayor voted to dismiss the case even before these firefighters had a chance to go to trial. The panel of three judges that she participated in issued a one-page opinion that was unpublished and did not even address these claims for the merits of the case or the constitutional issues brought by these petitioners.

Madam President, I ask unanimous consent to speak for an additional 3 minutes.

The PRESIDING OFFICER (Mrs. HAGAN.) Without objection, it is so ordered.

Mr. CORNYN. The firefighters were disappointed in Judge Sotomayor's de-

cision, and, indeed, some of her colleagues on the bench were shocked by the refusal to even acknowledge, much less address, the claims by these firefighters.

One colleague, Judge Jose Cabranes, appointed by President Clinton, worked to get the case reconsidered by the entire Second Circuit. He wrote that the case might involve "an unconstitutional racial quota or setaside." He said, "At its core, this case presents a straightforward question: May a municipal employer disregard the results of a qualifying examination which was carefully constructed to ensure race-neutrality, on the ground that the results of the examination yielded too many qualified applicants of one race and not enough of another?"

Judge Sotomayor apparently was not persuaded to answer that question. But thankfully the U.S. Supreme Court will. In a matter of days, we will know the U.S. Supreme Court's decision, which will help the American people understand whether Judge Sotomayor's philosophy is within the judicial mainframe or well outside it.

There are other statements that the judge has made in the course of her long career, including one at Berkeley in 2001, which has received quite a bit of press coverage where she said:

I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

President Obama has said she misspoke. But it is clear that is not the case. Congressional Quarterly reported that she used this language, or something very similar to it, in multiple speeches in 1994 to 2003.

It would be one thing if Judge Sotomayor was simply celebrating her own journey as a successful Latino woman in our country. Every American would understand that, because her story is an American success story. And all of us can justly take pride that someone of a humble origin who worked hard and sacrificed has achieved so much in this country.

In particular, the Hispanic community is justly proud of her achievements. She is, indeed, a role model for young people and is a symbol of success.

All Americans can be proud that Hispanics are assuming more and more positions of authority in our society. Indeed, the Bush administration nominated more Hispanic Federal judges than any previous administration. Unfortunately, they have not always received the sort of fair and dignified consideration that Judge Sotomayor will.

Miguel Estrada, who was nominated for the Second Circuit, was not treated respectfully during his confirmation proceedings. He was filibustered seven times, and denied an up-or-down vote on his confirmation.

So I wish to make clear that there is no problem if Judge Sotomayor was

simply showing pride in her heritage as we all should as a nation of immigrants. But if it suggests a judicial philosophy that says that because of sex or race or ethnicity, a judge is better qualified and more likely to reach correct legal decisions, I simply do not understand that contention, and I would like the opportunity to ask her about it.

One of her fellow judges contrasted their views by saying:

. . . judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law.

I think that is exactly right. So we need to know whether Judge Sotomayor embraces this notion of colorblind justice that most Americans expect from the highest Court in the land. I hope she will be given an opportunity—indeed she will be given an opportunity—to clarify her comments and let us know whether she intends to be a Supreme Court Justice for all of us or just for some of us.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

#### ORDER OF PROCEDURE

Mrs. SHAHEEN. I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. BOXER. Madam President, if the Senator will yield for a unanimous consent request, I am here to speak on the same subject as she. I wonder if she could expand her request to say that upon finishing, I could have about 5 minutes.

Mrs. SHAHEEN. I am delighted to do so for my colleague from California.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. BOXER. I thank the Senator.

Mr. CARPER. Would the Senator restate her request.

The PRESIDING OFFICER. The Senator from California has requested 5 minutes.

Mr. CARPER. I have been waiting for a while.

Mrs. BOXER. Madam President, I apologize to my colleague. We are here to quickly speak about a very important issue, the murder of a doctor. I didn't want it to be interrupted. I ask unanimous consent that following my remarks, the Senator from Delaware be recognized.

Mr. GREGG. Reserving the right to object, as I understand it, we are supposed to be moving to the supplemental. There is a unanimous consent agreement which has been reached. Hopefully, that will be placed in order.

The PRESIDING OFFICER. The Senate is in a period of morning business.

Mr. GREGG. I object to any more unanimous consents.

Mrs. BOXER. They already passed.

Mr. GREGG. I am objecting to the one the Senator from California just propounded.